THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ASPEN GROVE OWNERS ASSOCIATION, a Washington non-profit corporation,

Plaintiff,

v.

PARK PROMENADE APARTMENTS, LLC, a California limited liability company; WINDBRIDGE, LLC, a California limited liability company; HOLTON KABILI SEATTLE, LLC, a dissolved Colorado limited liability company; ALTMAN SEATTLE, LLC, a Colorado limited liability company; AGR BUILDING, INC., a Colorado corporation; DOE DECLARANT AFFILIATES 1-20; DON ALTMAN, an individual, and JANE DOE ALTMAN and the marital community comprised thereof; SHIMON KABILI, an individual, and JANE DOE KABILI and the marital community comprised thereof; SCOTT HOLTON, an individual, and JANE DOE HOLTON, and the marital community comprised thereof; MICHAEL BOSMA, an individual, and JANE DOE BOSMA and the marital community comprised thereof; MELINDA ABPLANALP, an individual, and JOHN DOE ABPLANALP and the marital community comprised thereof; SCOTT HAMILTON, an individual, and JANE DOE HAMILTON and the marital community

Case No. CV09-1110

ORDER

comprised thereof; BEN HARDING, an individual, and JANE DOE HARDING and the marital community comprised thereof; JOHN HIBBS, an individual, and JANE DOE HIBBS and the marital community comprised thereof; KAREN LIBIN, an individual, and JOHN DOE LIBIN and the marital community comprised thereof; DOE PRINCIPALS 1-10; DOE DECLARANT AGENTS 1-5; DOE SALES AGENTS 1-10; DOE CONTRACTORS 1-20,

Defendants.

This matter comes before the Court on Plaintiff's motion for summary judgment regarding undisputed defects (Dkt. No. 149), Defendants' response (Dkt. No. 158), and Plaintiff's reply. (Dkt. No. 165.) The Court also considers Defendants' motion to strike the declaration of Christine White. (Dkt. No. 164.) Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motions for the reasons explained herein.

I. BACKGROUND

This case arises out of the 2005 conversion of an apartment complex into a condominium complex and the ensuing allegations of poor construction and insufficient disclosure. The facts of this case have been discussed at length and need not be repeated here. (Dkt. No. 54.) This motion concerns a set of defects in the Aspen Grove complex, specifically missing building paper or mislapped building paper, deteriorated gypsum sheeting below windows, and rotted stick framing (the Defects). Plaintiff seeks summary judgment on Defendants liability for the cost of repairing the Defects on three grounds: the Defects violate the Washington Condominium Act's (WCA) warranty of suitability, the Defendants failed to inspect for the Defects in violation of the WCA, and Defendants deceived the unit purchasers in violation of the Washington Consumer Protection Act (CPA) by failing to disclose the Defects and by providing an artificially low estimate of monthly repair costs.

II. APPLICABLE LAW

Federal Rule of Civil Procedure 56(c) mandates that a motion for summary judgment be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). There exists a genuine issue as to a particular fact—and hence that fact "can be resolved only by a finder of fact" at trial—when "[it] may reasonably be resolved in favor of either party"; conversely, there exists no genuine issue when reasonable minds could not differ as to the import of the evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250–52 (1986). Whether a particular fact is material, in turn, is determined by the substantive law of the case: "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." *Id.* at 248. Summary judgment, then, demands an inquiry into "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law"; if applying the relevant law to those facts about which no two reasonable factfinders could disagree dictates that the moving party must prevail, then a motion for summary judgment must be granted. *Id.* at 250–52.

III. DISCUSSION

A. Warranty of Suitability

Section 445 of the WCA establishes a warranty of suitability covering the sale of condominiums:

> A declarant and any dealer impliedly warrants that a unit and the common elements in the condominium are suitable for the ordinary uses of real estate of its type and that any improvements made or contracted for by such declarant or dealer will be: (a) Free from defective materials; (b) Constructed in accordance with sound engineering and construction standards; (c) Constructed in a workmanlike manner; and (d) Constructed in compliance with all laws then applicable to such improvements.

RCW 64.34.445.

The bulk of Plaintiff's motion is not tailored to this standard. Rather than addressing materials or construction standards, Plaintiff's brief focuses on the current state of disrepair: "Likewise, the experts agree that the Undisputed Defects present a substantial risk of future danger of structural failure, mold, and loss of fire resistance; therefore the Undisputed Defects violate the WCA warranty of suitability." (Mot. 9 (Dkt. No. 149).) This conclusion of law appears to be based on a line from the opinion in *Westlake View Condo. Ass'n v. Sixth Ave. View Partners, LLC*, 146 Wn. App. 760 (Wash. Ct. App. 2008), in which the court states: **"**Rather, if the violations present a substantial risk of future danger, the implied warranty of habitability is a viable claim." *Id.* at 771-72. There is a vast difference, however, between a viable claim and a claim on which a party is entitled to summary judgment. In fact, three sentences prior, the court in *Westlake* wrote: "Whether these problems rise to the level of breaching the implied warranty of habitability is a question for the jury." *Id.* at 771.

The only portion of Plaintiff's motion that relates to the language of Section 445 is a passage describing the deposition of Gregory Mockford, one of the Defendants' experts. Mockford states that the window installations at Aspen Grove were not in compliance with the 1990 building codes with respect to reverse lapping, discontinuous weather barrier, and integration of the paper to the window frame. (Houser Decl. Ex. A 58: 15–23 (Dkt. No. 150).) Plaintiff has simply failed, however, to provide enough information to merit summary judgment as a matter of law. There remain genuine issues of material fact with respect to what the 1990 building code actually says, how many windows Mockford inspected, the extent of the problems he discovered, and whether Plaintiff homeowners aggravated the water intrusion due to lack of maintenance. These issues are an improper subject for a summary-judgment motion.

B. Failure to Inspect

Section 415 of the WCA establishes requirements for the inspection report that accompanies a condominium public offering statement:

> [The POS shall contain] [e]ither a copy of a report prepared by an independent, licensed architect or engineer, or a statement by the declarant based on such report, which report or statement describes, *to the extent reasonably ascertainable*, the present condition of all structural components and mechanical and electrical installations material to the use and enjoyment of the condominium;

RCW 64.34.445 (emphasis added). The parties agree that Defendants performed a visual inspection but did not remove building trim to examine structural components, a process called "invasive inspection." The issue in dispute is whether the condition of certain structural components was reasonably ascertainable if it could only be ascertained with an invasive inspection. Plaintiff claims that Defendants' own experts agree that a reasonable inspector would have identified signs of water intrusion, selected areas to look under, and would have found the Defects. (Mot. 4 (Dkt. No. 149).) This is false. Defendants' expert, Gregory Mockford, was asked if the scope of repairs performed by the Defendants would have been appropriate had Mockford been the one to conduct the initial inspection. Mockford replied that he would have probably identified more damage and performed additional repairs. (Houser Decl. Ex. A 75:2–17 (Dkt. No. 150).) Mockford said nothing about what a reasonable inspector would or would not have done, merely what he himself would have *probably* done. Plaintiff has failed to show that there is no genuine issue of material fact as to the reasonableness of the inspection.

C. Consumer Protection Act Claim

Plaintiff also seeks summary judgment on its CPA claims. In order to maintain a private CPA action, a plaintiff must establish five elements: (1) an unfair or deceptive act or practice (2) occurring in trade or commerce, (3) public interest impact, (4) injury to plaintiff in his or her business or property, and (5) a causal link between the unfair or deceptive acts and

the injury suffered by the plaintiff. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 719 P.2d 531, 535 (Wash. 1986).

The primary dispute between the parties is whether Plaintiff has standing to bring a CPA claim. Associations of individuals can establish standing in two different ways: direct standing for injuries to the association and representational standing for injuries to its members. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *see, e.g., United States v. SCRAP*, 412 U.S. 669 (1973). Plaintiff claims that it has representational standing to litigate claims for harm to its members stemming from allegedly deceptive failure to disclose defects. (Reply 13 (Dkt. No. 165).) Defendants respond that Plaintiff does not meet the requirements for an organization suing in its representative capacity. The Supreme Court has established a three-prong test for determining whether an organization can sue in its representative capacity. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). "An association has standing to bring suit on behalf of its members when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt*, 432 U.S. at 343. The problem, Defendants argue, is with the third prong.

It would be impossible, Defendants explain, for Plaintiff to bring a CPA claim without the participation of individual members. (Resp. 23 (Dkt. No. 158).) The Court agrees. For Plaintiff's CPA claim to succeed, it must be able to show that each homeowner was injured and that each injury was caused by Defendants' allegedly unfair or deceptive acts. *See Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 850 (9th Cir. 2001) ("Because the appropriate relief—determining what, if any, just compensation is due to the owner of the property taken—necessarily requires the participation of the individual members, Washington Legal Foundation does not have representational standing to pursue a Fifth Amendment taking claim.").

Plaintiff does not say how injury and causation can be established without the participation of individual homeowners. Instead, Plaintiff cites *Satomi Owners Ass'n v. Satomi, LLC*, 225 P.3d 213, 231 (Wash. 2009), a recent Supreme Court of Washington case for the proposition that a condominium association does have standing to pursue CPA claims in a representational capacity. (Reply 13 (Dkt. No. 165).) Plaintiff misstates the holding in *Satomi*. That case concerned efforts by a homeowner's association to quash an arbitration demand on the grounds that it was a separate legal entity from the homeowners who signed the agreement to arbitrate. The court affirmed the Court of Appeals, which had held that to the extent the Association could bring any claims, those claims were only as good as those of its constituent members. *Satomi*, 225 P.3d at 231 (citing *Satomi Owners Ass'n v. Satomi, LLC*, 159 P.3d 460 (Wash. Ct. App. 2007)). This is not an affirmative declaration or expansion of the power of a homeowners association to bring suit, but rather a limitation on that power. Discussion of representational standing in the context of CPA claims was dicta, not a holding, and offers no guidance to this Court. The Court finds that Plaintiff lacks standing to pursue the CPA claims in a representational capacity. *See also Riverfront Landing Phase II Owners' Ass'n v. Assurance Co. of Am.*, 2009 U.S. Dist. LEXIS 57089 (W.D. Wash. July 6, 2009) ("However, the Association has not shown that at the time it filed suit, it had standing to assert claims for bad faith, negligence, and violations of the IFCA and CPA."). Accordingly, Plaintiff's CPA claims are dismissed without prejudice.

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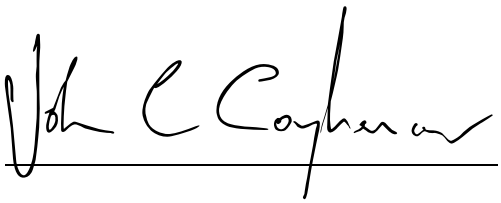
IV. CONCLUSION

For all the above reasons, Plaintiff's motion for summary judgment is DENIED. (Dkt. No. 149.) Plaintiff's CPA claims are DISMISSED without prejudice. Defendants' motion to strike is DENIED. (Dkt. No. 164.)

DATED this 19th day of November, 2010.



John C. Coughenour
UNITED STATES DISTRICT JUDGE